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In the Supreme Court of the United States

TYSON FORD,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an encounter between the police and an individual become a seizure within the meaning of the Fourth Amendment when the police retain the individual's license, refuse to return it when asked, fail to advise or indicate that the individual may leave, and start questioning the individual on unrelated, potentially criminal, matters?

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PETITION FOR A WRIT OF CERTIORARI

Tyson Ford respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at *United States v. Ford*, 548 F.3d 1 (1st Cir. 2008), and reprinted as Appendix A. The court of appeals affirmed the decision of the district court, which is reported at 440 F. Supp. 2d 16 (D. Mass. 2006), and reprinted as Appendix B.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the First Circuit entered its judgment and opinion on November 5, 2008. Justice Souter granted petitioner's application to extend the time to file a petition for a writ of certiorari through and including March 20, 2009. Supreme Court Dkt. No. 08A549. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. On September 8, 2005, around 3:00 p.m., Petitioner Tyson Ford was walking through the Dorchester section of Boston, Massachusetts, which officers describe as a "hot spot" for criminal activities. Pet. App. 17a–18a. At that time, Boston Police Department Officers Daran Edwards and Daniel Griffin were on patrol in the area. Pet. App. 17a. The officers observed Mr. Ford walking alone down Harvard Street. Pet. App. 18a. There was nothing unusual or suspicious about Mr. Ford, and the officers had no belief upon viewing him that he was engaged in any criminal activity. Pet. App. 38a–39a, 44a. Neither officer knew the identity of the individual they were following. Pet. App. 2a, 39a. And, as the government concedes, the officers did not have reasonable suspicion or probable cause that Mr. Ford was engaged in wrongdoing. Pet. App. 5a.

As the police cruiser approached Mr. Ford, he turned onto Gleason Street, a one-way street running in the opposition direction. Pet. App. 18a. Still lacking any suspicion that Mr. Ford was engaged in criminal activity, the officers turned their cruiser the wrong way down the one-way street and followed Mr. Ford. Pet. App. 2a. The officers then pulled the cruiser alongside Mr. Ford, and Officer Griffin called out to him from the passenger window "Hey James, where you been?" Pet. App. 45a. At

that time, Officer Griffin still did not know the identity of Mr. Ford and had no reason to believe his name was James. Pet. App. 19a.

Not wishing to be mistaken for "James," Mr. Ford stopped and identified himself to Officer Griffin. Pet. App. 45a–47a. Mr. Ford then handed his driver's license to Officer Griffin, telling him "I don't have any warrants, I'm not on probation." Pet. App. 19a, 46a. Officer Griffin took Mr. Ford's identification inside the cruiser and handed it to Officer Edwards, who began a warrant search on the police database. Pet. App. 19a.

While Officer Edwards retained Mr. Ford's identification, Officer Griffin continued to question Mr. Ford. Pet. App. 19a. Officer Griffin asked Mr. Ford "Do you live around here?" and "Where are you headed?" Pet. App. 19a. Mr. Ford gave a home address matching the address on his license. Pet. App. 40a–41a. Officer Griffin also asked Mr. Ford whether he had ever been arrested and "Do you have anything on you we need to know about?" Pet. App. 19a. Mr. Ford replied, "No." Pet. App. 19a.

At that point, Officers Griffin and Edwards both got out of the police cruiser and approached Mr. Ford. Pet. App. 19a. Officer Edwards did not return Mr. Ford's identification, instead leaving it within the police cruiser where Mr. Ford was unable to retrieve it. Neither officer told Mr. Ford, or indicated in any other way, that he was free to leave or terminate the encounter. Pet. App. 43a–44a.

Mr. Ford asked the officers "what about my ID?" and "what's this all about?" Pet. App. 47a. Officer Griffin again asked Mr. Ford whether he had any weapons on him. Pet. App. 20a. Mr. Ford answered "Yeah, I got a gun in my pocket, but it don't fire." Pet. App. 20a. The officers then placed Mr. Ford in handcuffs and frisked him. Pet. App. 20a. Officer Griffin seized a non-operational handgun from the pocket of Mr. Ford's pants. Pet. App. 20a. The officers then arrested him. Pet. App. 20a.

2. On November 1, 2005, Mr. Ford was charged with being a convicted felon in possession of a firearm under 18 U.S.C. § 922(g)(1) in the United States District Court for the District of Massachusetts. Pet. App. 4a. Mr. Ford moved in the district court to suppress the firearm seized by Officers Griffin and Edwards as the fruits of an illegal seizure under the Fourth Amendment. Pet. App. 4a. He also moved to suppress certain statements made to the officers, including his statement that he possessed a non-functioning gun. Pet. App. 4a.

On April 25, 2006, the district court held a hearing on the motion to suppress at which Mr. Ford, and Officers Griffin and Edwards testified about the events leading up to Mr. Ford's arrest. Pet. App. 36a.[1] When asked to describe his

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[1] Notwithstanding the First Circuit's statement to the contrary, *see* Pet. App. 12a–13a, Mr. Ford unquestionably testified at the suppression hearing. *See, e.g.*, Pet. App. 45a–48a.

"attitude" at the time of the encounter, Mr. Ford explained:

> At the time I felt like I couldn't walk away. They had my identification. So if I was free to leave, I could never leave. I paid for that driver's license. I was trying to obtain it but I couldn't. It was in their possession.

Pet. App. 47a. Later in his testimony, Mr. Ford elaborated about how he had requested the return of his license, and how the officers' refusal to do so made him feel trapped:

> Q: Did the car block your ability to go forward on Gleason Street?
>
> A: No, but once they had my ID in their possession, I couldn't leave. I did ask for it at one point.
>
> Q: You asked them for your ID?
>
> A: Yes, I did.
>
> Q: And when was that?
>
> A: That was after the fact. That was – once they got out of the car, that's when I said what about my ID. And I said what's this all about. I did ask for my ID because I felt I didn't commit no crimes. . . . They know I did nothing wrong, give me my ID and let me go mind my business.

Pet. App. 47a.

Despite this testimony, on July 20, 2006, the district court concluded that the officers had *not* seized Mr. Ford within the meaning of the Fourth Amendment. Pet. App. 4a. Rather, the court held, Mr. Ford's incriminating statements occurred during a consensual encounter that did not implicate his Fourth Amendment rights. Pet. App. 33a. "The most important factor," the district court determined, "is that the Defendant voluntarily stopped walking and voluntarily produced his identification." Pet. App. 29a. Accordingly, the court denied Mr. Ford's motion to suppress. Pet. App. 34a.

On October 4, 2006, Mr. Ford entered a conditional plea of guilty, reserving the right to appeal the denial of his suppression motion. Pet. App. 4a. The district court, on October 11, 2006, sentenced Mr. Ford to the mandatory statutory term of imprisonment of fifteen years. Pet. App. 4a. On October 16, 2007, Mr. Ford timely noticed his appeal to the United States Court of Appeals for the First Circuit. Pet. App. 4a.

3. On appeal, the First Circuit considered whether, at any point prior to the discovery of the firearm, Mr. Ford had been seized by the officers within the meaning of the Fourth Amendment. Pet. App. 4a–5a. As a preliminary matter, the court noted that "the Government concedes . . . that the Officers lacked the reasonable suspicion required for a seizure and that, if a seizure occurred, the handgun found on Ford's person 'must be suppressed as tainted fruit.'" Pet. App. 5a (citing *Florida v. Bostick*, 501 U.S. 429, 433–434 (1991)).

The question before the court, then, was whether the encounter between the officers and Mr. Ford converted into a seizure, thus implicating Mr. Ford's Fourth Amendment rights. Pet. App. 6a. This inquiry turned on the standard the Supreme Court articulated in *United States v. Mendenhall*: whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Pet. App. 7a (quoting 446 U.S. 544, 554 (1980)).

In assessing whether the officers' retention of Mr. Ford's identification during questioning constituted a seizure, the First Circuit refused to apply *Florida v. Royer*, 460 U.S. 491, 493–494 (1983), in which this Court held that the retention of an individual's license and airplane ticket during questioning effected a seizure of that individual. Pet. App. 11a.

While refusing to apply *Royer* to the facts of the present case, the First Circuit acknowledged that the D.C. Circuit had taken the contrary approach, reading *Royer* to forbid unnecessary police retention of an individual's license. Pet. App. 12a. Rejecting the D.C. Circuit's approach, the First Circuit followed the Fourth's Circuit decision in *United States v. Weaver*, 282 F.3d 302, 313 (4th Cir. 2002), to hold that an officer's retention of a license during continued questioning does not necessarily constitute a seizure. Pet. App. 12a. The court concluded: "While the retention of Ford's license is an important factor in our analysis, we decline to elevate it above other considerations." Pet. App. 12a.

Accordingly, the First Circuit affirmed Mr. Ford's conviction under 18 U.S.C. § 922(g)(1) and the district court's denial of Mr. Ford's motion to suppress. Pet. App. 15a. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

In *Florida v. Royer*, 460 U.S. 491 (1983), a plurality of this Court established that a consensual encounter between the police and an individual escalates into a Fourth Amendment "seizure" when the police *retain* the individual's identification beyond the time necessary to conduct an initial inquiry into the person's identity, using that retention as leverage to conduct or continue an investigation. But in the wake of *Royer*, the lower courts have adopted conflicting legal standards to address such situations.

Some courts correctly read *Royer* to place primacy on the police's decision to retain an individual license. They therefore hold that retention along with minor additional factors, such as investigatory questioning or the failure to disclose that the individual is free to leave, transforms the encounter into a detention that *must* be predicated upon reasonable suspicion. Other courts—including the First Circuit in its decision below—have refused to follow suit. As a result, courts across the country are failing to apply uniform rules governing the dividing line between consensual police encounters and "seizures" subjected to Fourth Amendment scrutiny.

Though Fourth Amendment issues are always, to a certain degree, fact-bound, the conflict here is one easily susceptible to this Court's resolution. The lower courts disagree not about a question of fact, but rather about the legal weight that license retention should receive in a constitutional seizure analysis. This confusion is firmly entrenched on an issue relevant to myriad interactions between average citizens and the police. The instant case provides the Court with a clean vehicle through which it can resolve this disagreement and restore clarity to Fourth Amendment jurisprudence.

This Court should therefore grant the petition for a writ of certiorari in order to review (and ultimately reverse) the First Circuit's decision below.

I. The Decision Below Deepens a Mature Disagreement Regarding the Effect of Retention of an Individual's Identification on Whether That Individual Was Seized Within the Meaning of the Fourth Amendment.

A. The Fifth, Tenth, and D.C. Circuits Have All Held That a Police Officer's Continued Questioning While Retaining an Individual's License Effects a Seizure of the Individual.

In a series of cases involving consensual encounters between police and individuals the Fifth, Tenth, and D.C. Circuits have all held that a Fourth Amendment seizure occurs whenever a police officer, while retaining an individual's license or

identification, investigates subject matter unrelated to the original reason for requesting the identification.

1. The D.C. and Tenth Circuits have each applied this rule in cases factually similar to petitioner's—*i.e.*, where a police interaction with a random pedestrian escalated into a Fourth Amendment seizure.

a. In *United States v. Jordan*, 958 F.2d 1085 (D.C. Cir. 1992), the D.C. Circuit considered whether a person was constitutionally seized when an officer requested permission to search his bag while retaining Jordan's driver's license. *Id.* at 1088. The police detective approached Jordan as he was walking across a bus terminal's parking lot and preparing to enter his car. *Id.* at 1086. Upon the officer's request, Jordan handed the officer his driver's license and bus ticket. *Id.* Rather than return Jordan's identification after review, the detective continued with his investigation by asking Jordan whether he was carrying drugs and, ultimately, searching Jordan's bag and discovering illegal substances. *Id.*

On appeal, the D.C. Circuit rejected the argument that the encounter between Jordan and the police never escalated into an investigatory detention. *Id.* at 1086–1089. In doing so, the court adopted a common-sense objective rule, explaining that it had:

> considered on several occasions the effect on citizens stopped by the police of being asked

> to hand over critical identification or travel documents *and having the police retain them while questioning ensues*, noting that "once the identification is handed over to police and they have had a reasonable opportunity to review it, if the identification is not returned to the detainee [it is] difficult to imagine that any reasonable person would feel free to leave without it."

Id. at 1087 (quoting *United States v. Battista*, 876 F.2d 201, 205 (D.C. Cir. 1989)). The court drew support for this rule directly from this Court's opinion in *Royer*—in particular, its emphasis on the continued questioning of the suspect as facilitated by the retention of the license. *Id.* In doing so, the D.C. Circuit correctly held that Jordan had been seized when the officer retained his license and continued to question him.

b. The Tenth Circuit reached a similar conclusion, most recently in *United States v. Lopez*, 443 F.3d 1280 (10th Cir. 2006). In *Lopez*, a police officer approached two individuals who were standing next to a running vehicle. *Id.* at 1282. The police officer had already run the vehicle's license plates through his mobile data terminal, determining both the owner of the vehicle and that it was not reported stolen. *Id.* The officer requested identification from both men, and was able to determine "within seconds" that the address on Lopez's license matched the car's registration. *Id.* at 1282, 1285. Nevertheless, the police officer retained Lopez's license and returned to his cruiser to run a warrants check on Lopez, without giving him and his

colleague any indication that they were free to leave the area. *Id.* at 1282. When the investigation revealed that Lopez was wanted for a misdemeanor, the officer arrested Lopez and searched his person and vehicle, finding drugs and a firearm. *Id.* at 1282.

On appeal, the Tenth Circuit affirmed the district court's holding that Lopez had been unconstitutionally seized during his encounter with the police. In reaching this conclusion, the court of appeals recognized that the officer's request for Lopez's identification, standing alone, did not implicate the Fourth Amendment. *Id.* at 1285 (citing *United States v. Mendenhall*, 446 U.S. 544). Nevertheless, the Tenth Circuit held that the officer's *retention* of Lopez's license after his identity had been verified, coupled with the officer's failure to tell Lopez that he was free to leave, transformed their encounter into an investigatory detention unsupported by reasonable suspicion.

> The Supreme Court has also made clear, however, that an individual "may not be detained *even momentarily* without reasonable, objective grounds for doing so." . . . At the time he asked for Lopez's identification, [the officer] knew the address of the owner of the car next to which Lopez was standing and knew the car had not been reported stolen. Within seconds of reviewing Lopez's license, [the officer] was able to establish Lopez's identity and confirm that Lopez's address matched the address on the car registration. After that point in time,

> the continued retention of Lopez's license was undue.

Id. at 1285 (quoting *Royer*, 460 U.S. at 498; emphasis in original). The *Lopez* court thus reached the same conclusion as the D.C. Circuit did in *Jordan*—under the totality of the circumstances, no reasonable person would feel free to terminate a police encounter after the police officer fails to return personal identification materials. *Id.* at 1285–1286.

2. This same rule has been elaborated upon in the factually-similar context of vehicle stops. The Tenth Circuit expressly acknowledged this connection in *United States v. Lambert*, 46 F.3d 1064 (10th Cir. 1995), a case factually similar to *Lopez*. In that case, the Tenth Circuit analogized that, "though not directly on point in the context of this case, the Tenth Circuit has consistently held that the undue retention of an individual's driver's license during a traffic stop renders the encounter nonconsensual." *Id.* at 1068 (citing *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir. 1990) ("This Circuit follows the bright-line rule that an encounter initiated by a traffic stop may not be deemed consensual unless the driver's documents have been returned to him.")). The *Lambert* court thus recognized a universal rule applicable to both the vehicle and pedestrian contexts and echoed in the D.C. Circuit: "when law enforcement officials retain an individual's driver's license in the course of questioning him, the individual, as a general rule, will not reasonably feel free to terminate the encounter." *Id.* at 1068.

In a similar situation involving a non-consensual encounter arising out of a traffic stop, the Fifth Circuit reached the same conclusion. *See United States v. Chavez-Villarreal*, 3 F.3d 124 (5th Cir. 1993). In *Chavez-Villarreal*, the Fifth Circuit found that where an officer had stopped a vehicle, taken and retained the driver's alien registration card, and then asked for permission to search the vehicle, the officer violated the Fourth Amendment. *Id.* at 128. In reaching this holding, the court highlighted the officer's unwarranted retention of Chavez-Villarreal's identification during subsequent questioning as the critical coercive element:

> After he had ascertained the legal immigration status of Chavez-Villarreal and his passenger, [the agent] retained possession of their alien registration cards. He still held the cards when he asked for permission to search. The card was vital to Chavez-Villarreal . . . ; without it, his disposition, if indeed not ability, to decline [the agent's] request expectedly was significantly impaired.

Id. The Fifth Circuit thus recognized the same rule applied in both the Tenth and D.C. Circuits. *See id.* at 128 n.16 (citing *Jordan*, 958 F.2d at 1087).

In a variety of contexts, then, the Fifth, Tenth, and D.C. Circuits have all reaffirmed a common, universal legal rule: retention of an individual's identification during unrelated investigatory questioning transforms an encounter into an investigative detention, and thus, a "seizure" under

the Fourth Amendment. Accordingly, the decision below in the First Circuit conflicts with these circuit decisions.

B. The First Circuit Below Joins the Second, Fourth, and Eighth Circuits in Holding that an Individual is Not Seized When an Officer Engages in Unrelated Investigatory Questioning While Retaining the Individual's Identification.

The First Circuit is not the only court of appeals to have rejected the rule described above. The Second, Fourth, and Eighth Circuits have similarly refused to find a seizure in factually similar circumstances.

1. In *United States v. Weaver*, 282 F.3d 302 (4th Cir. 2002), the Fourth Circuit refused to hold that retention of identification during unrelated investigatory questioning necessarily transforms a voluntary police encounter into an investigatory detention. In that case, a police officer approached and initiated a conversation with Weaver, who was walking nearby a bank where the officer believed a "suspicious individual" had recently been spotted. *Id.* at 306–307. During this conversation, the officer asked for Weaver's driver's license so that he could run a computer check for any outstanding warrants. *Id.* at 307. Yet rather than return the license after determining that there were no such warrants, the officer retained the license and asked Weaver to accompany him to several nearby banks, where Weaver was ultimately identified as a person wanted

in connection with a recent bank robbery. *Id.*. A subsequent search revealed additional evidence that tied Weaver to several robberies. *Id.*

On appeal, the Fourth Circuit "expressly refuse[d] to adopt a bright-line rule that when an officer retains an individual's identification beyond its intended purpose . . . the individual whose identification is retained is effectively seized for purposes of the Fourth Amendment." *Id.* at 310. Although the court of appeals acknowledged that several circuits had adopted such a rule, it rejected them as "contrary to the Supreme Court's teachings . . . because they elevate one factor above all others in determining whether a seizure has occurred." *Id.* at 313 (dismissing decisions of the Fifth, Seventh, Eleventh, and D.C. Circuits). Instead, the Fourth Circuit relied upon a series of its prior traffic stop decisions, which approved of questioning or searches that occurred *after* a driver's identification was returned. *Id.* at 310–312. In doing so, the Fourth Circuit focused heavily on the nature of the police encounter at its inception, rather than addressing whether the encounter transformed into an investigative detention after Weaver's license was retained. *Id.* at 311–312 (noting Weaver "could have refused to cooperate when [the officer] asked him for his identification").

The Fourth Circuit has thus adopted the same approach espoused by the First Circuit below—that unwarranted retention of an individual's license during unrelated investigatory questioning does not necessarily constitute a Fourth Amendment seizure.

See Pet. App. 12a (citing *Weaver* for refusal to adopt D.C. Circuit's categorical rule).

2. The Second and Eighth Circuits have also held that asking to search an individual's belongings, while holding onto their identification, does not constitute a seizure—albeit in cases where they ultimately found a seizure triggered by subsequent events.

In *United States v. Glover*, 957 F.2d 1004 (2d Cir. 1992), the Second Circuit considered a case wherein officers approaching Glover in a bus terminal requested his identification and then, while holding that identification, asked repeatedly to search his bags. *Id.* at 1006–1007. After Glover refused, the officers asked Glover to accompany them to a security office for further questioning, where they informed him that his bags would be detained pending review by a drug-sniffing dog. *Id.* at 1007.

Although the court of appeals ultimately concluded that Glover and his bags had been constitutionally seized, the court's logic contradicts that of the Fifth, Tenth, and D.C. Circuits. Critically, the Second Circuit determined that "prior to the time [the officer] asked Glover to return to the NFTA security office, the encounter was consensual." *Id.* at 1009. In reaching this holding, the court thus indicated that the request by the officers to search Glover's bag, made while in possession of his identification, did not constitute a seizure. The court instead concluded that:

> [W]hen Terranova requested Glover to leave the public area of the terminal and to return to the NFTA security office for further questioning, without returning Glover's identification and without telling Glover that he was free to leave, we believe that Glover and his bags were seized.

Id. Such a holding accords with the *Weaver* rule by requiring more than retention of identification to transform an encounter into an investigatory detention.

Similarly, in *United States v. Carpenter*, 462 F.3d 981 (8th Cir. 2006), the Eighth Circuit reached the same conclusion as the Second Circuit in *Glover*. In *Carpenter*, the court held that when an officer approached a vehicle on the side of the road, asked the driver for identification and, while holding that identification, asked to search the boxes in the vehicle, this did not constitute a seizure. *Id.* at 985–986. The court instead found that a seizure did not occur until later, when the officer had Carpenter exit the vehicle, patted him down, and told him if he did not consent to the search the officer would call for a drug dog. *Id.* at 986. In the process of reaching this holding, the Eighth Circuit rejected Glover's argument that the he was seized at an earlier time due to the collection of his identification papers.

In both of these cases, the police request to search the luggage or vehicle was made while the officer retained the individual's driver's license, yet was unrelated to the officer's original request for that identification. The Second and Eighth Circuit's

holding of no seizure under these circumstances is therefore consistent with the Fourth Circuit's approach in *Weaver*, but contradicts the more bright-line analytical rule adopted in the Fifth, Tenth, and D.C. Circuits.

C. The Seventh and Eleventh Circuits Have Inconsistently Applied Both Approaches.

Further complicating the issue, the Seventh and Eleventh Circuits have failed to consistently apply a single legal rule regarding the Fourth Amendment ramifications of license retention. Rather, although both have previously adopted the bright-line rule advanced by petitioners, both have also departed from that rule in recent cases. This lack of consistency is further evidence of the uncertainty among, and within, the circuits on how to appropriately interpret and apply the Fourth Amendment's requirements.

1. For a long time, the Seventh Circuit had been recognized as a pioneer for holding that the unnecessary retention of a person's identification transforms a consensual police encounter into an investigatory detention. *See United States v. Cordell*, 723 F.2d 1283 (7th Cir. 1983). In *Cordell*, the Seventh Circuit held that a seizure occurred when police officers stopped an individual exiting a flight, requested his identification and plane ticket and then, while retaining his identification, told him they were conducting a narcotics investigation, asked if he was carrying narcotics, and requested to search his bag.

Critically for present purposes, the Seventh Circuit determined that when the police retained Cordell's identification while telling him they were conducting a narcotics investigation, that *alone* transformed the consensual encounter into a seizure. *Id.* at 1285. In so holding that the seizure occurred at a point even before the police asked Cordell additional questions, the Seventh Circuit laid the foundation for later decisions such as *Jordan, Lopez,* and *Chavez-Villarreal. Cordell* acknowledged that retention of an individual's license was a tool that could be used to allow an officer to pressure an individual to answer additional unrelated investigatory questions, in this case regarding the narcotics investigation, which transforms a consensual encounter into a seizure. *See, e.g., Jordan*, 958 F.2d at 1087 n.2 (following *Cordell*). *But see Weaver*, 282 F.3d at 313 (rejecting *Cordell*).

Yet in *United States v. Goodwin*, 449 F.3d 766 (7th Cir. 2006), the Seventh Circuit failed to apply its own precedent. In *Goodwin*, the court of appeals found no seizure when officers approached an individual on a train, asked for his identification and then, while retaining the identification, asked if the individual had any weapons or narcotics and for permission to search his bags. *Id.* at 768. The *Goodwin* court made no mention of *Cordell*'s contrary rule. Instead, *Goodwin* merely reasoned that:

> It is true that the police officer to whom the defendant had handed his identification and ticket was still holding these items when the

> defendant [was questioned] . . . . But the interval was too brief to amount to seizure.

Id. Such a rule cannot be reconciled with *Cordell*'s prior holding, leaving the state of the law in the Seventh Circuit unclear.

2. Similar confusion has arisen in the Eleventh Circuit. In *United States v. Thompson*, 712 F.2d 1356 (11th Cir. 1983), the court of appeals arrived at the "common-sense conclusion" that a police officer's unnecessary retention of a license transformed a consensual encounter into an investigative detention. The court of appeals held the officer's conduct constituted a seizure because the officer "did more than simply request and examine Thompson's driver's license." *Id.* at 1359. Rather, because the officer retained the license during subsequent questioning, "the encounter matured into an investigative stop protected by the Fourth Amendment" *Id.* at 1359. In so holding, the Eleventh Circuit applied the same rule later adopted by the Fifth, Tenth, and D.C. Circuits, consistent with prior Eleventh Circuit precedent. *See United States v. Elsoffer*, 671 F.2d 1294, 1297 (11th Cir. 1982) (identifying retention of personal papers as moment where encounter transformed into seizure).

Yet, nine years later, in a factually similar case, the same court held that where a police officer stopped an individual who had exited his vehicle, requested his identification and, while retaining that identification, asked for permission to search his car, no seizure had occurred. *United States v. De La Rosa*, 922 F.2d 675 (11th Cir. 1991). The *De La Rosa*

court insisted that the case was distinguishable from *Thompson* because:

> [U]nlike the defendant in *Thompson*, [De La Rosa] had already exited his vehicle and was proceeding towards his home for the evening. Thus, temporary retention of the license did not preclude [De La Rosa] from terminating the encounter by going into his apartment.

Id. at 678 n.3. But nothing in the *Thompson* rule—the same rule applied in the Fifth, Tenth, and D.C. Circuits—supports the drawing of such a distinction. As a result, ordinary persons in the Eleventh Circuit, like the Seventh, are left without clear guidance regarding the scope of their constitutional rights during police encounters.

D. The State Courts Are Similarly Divided.

Adding to the confusion, state courts also apply different rules regarding license retention when applying the Fourth Amendment. Mirroring the split among the federal circuits, some states have reasoned that unnecessary retention of a license converts a consensual encounter into a seizure, while others have handed down decisions rejecting such a rule.

1. Courts in Georgia, Indiana, Tennessee, and Virginia have each held that a Fourth Amendment seizure occurs when a police officer retains an individual's license while investigating issues

unrelated to the officer's purpose for retaining the identification.

In *Rogers v. State*, 426 S.E.2d 209 (Ga. Ct. App. 1992), the Georgia Court of Appeals concluded that an individual was seized when an officer, while retaining his license, questioned the person about having drugs or weapons. *Id.* at 212–214. In doing so, the court acknowledged that, while an officer may "request and examine a driver's license and vehicle registration and run a check on the documents," in this case the officer also proceeded to "[ask] questions of [Rogers] that did not relate to any traffic or parking violations but instead probed into [Roger's] possession of contraband or weapons." *Id.* at 212. The court thus adopted the common-sense rule that, "if the police officer retains the driver's license, he or she must have reasonable and articulable suspicion to question the driver about drugs or weapons." *Id.*

The Supreme Court of Indiana reached a similar conclusion in *Finger v. State*, 799 N.E.2d 528 (Ind. 2003), ruling that an officer unlawfully seized two individuals by retaining their identification after running an unsuccessful warrant and license check, while continuing to question them about other matters. *Id.* at 530–535. In reaching that conclusion, the court recognized that, "the only factor Finger identifies as restraining him after his initial exchange with [the officer] was the fact that [the officer] obtained and then retained Finger's driver's license" as he continued to speak with them. *Id.* at 533. The court nevertheless recognized the importance license retention plays in a

constitutional analysis, by holding that, "when [the officer] returned to Finger's car after running license checks and did not return his identification, what arguably began as a consensual encounter evolved into an investigative stop." *Id.* The *Finger* Court thus reached a similar common-sense rule as the Georgia Appellate Court did in *Rogers*.

The Supreme Court of Tennessee and the Court of Appeals of Virginia adopted similar rules in *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000) and *Piggott v. Commonwealth*, 537 S.E.2d 618 (Va. Ct. App. 2000), two cases raising the common question of whether a seizure occurs when an officer retains an individual's identification to run a warrant check. On appeal, both courts determined that a seizure had occurred. *Daniel*, 12 S.W.3d at 427; *Piggott*, 537 S.E.2d at 619. The *Piggott* court noted, "the consensual aspect of the encounter ceased when [the officer] retained Piggott's identification while he ran a warrant check . . . . By retaining [his] identification, [the officer] implicitly commanded Piggott to stay." 537 S.E.2d at 619. Similarly, the *Daniel* court found, "when an officer retains a person's identification for the purpose of running a computer check for outstanding warrants, no reasonable person would believe that he or she could simply terminate the encounter." 12 S.W.3d at 427. In these cases, the warrant check amounted to the functional equivalent of an officer asking additional investigatory questions. Therefore, just as retention combined with investigatory questioning in *Rogers* and *Finger* compelled the conclusion that a seizure had occurred, the combination of license retention and

the running of the warrant check similarly constituted a seizure in *Piggott* and *Daniel*.

The courts of at least four states have thus adopted the same approach of the Fifth, Tenth, and D.C. Circuits—that retention of an individual's license during unrelated investigatory questioning constitutes a seizure under the Fourth Amendment.

2. Courts in Florida and Michigan, by contrast, have held that no seizure occurs where a police officer, while retaining an individual's license, engages in unrelated investigatory conduct.

a. In *Golphin v. State*, 945 So. 2d 1174 (Fla. 2006), the Supreme Court of Florida rejected the claim that an individual was seized when an officer retained his identification in order to run a warrant check, rather than returning it. *Id.* at 1190. In reaching this holding, the Court relied, in part, on the rationale that since the defendant could not have been legally penalized for walking away without his license, "retention of Golphin's identification would not have constrained his ability" to end the encounter. *Id.* at 1188. The court acknowledged that several other jurisdictions had "determined that retention of identification for the purposes of conducting a warrants check elevates an otherwise consensual encounter into an investigatory stop." *Id.* at 1189. Nevertheless, the court rejected the holdings of these other courts that found retention of even a pedestrian's license, when coupled with additional investigatory action, constitutes seizure. *Id.*

In a factually-similar case, the Supreme Court of Michigan arrived at the same conclusion. *People v. Jenkins*, 691 N.W.2d 759 (Mich. 2005). The *Jenkins* court determined that retention of identification during a warrant check did not affect the consensual nature of a police encounter. *Id.* at 764. The court instead concluded that "[t]he Fourth Amendment was not implicated" until later in the encounter, when the officer "actually hindered defendant's attempt to leave the scene" by telling him he could not do so. *Id.* at 765. Such a holding contradicts the legal rule adopted by other federal and state courts in factually indistinguishable circumstances.

This disagreement among the state courts, mirroring the split among the circuits, further demonstrates the confusion that exists regarding the proper interpretation and application of the Fourth Amendment in license-retention cases. Absent further guidance from this Court, such uncertainty will only increase.

II. Under This Court's Precedent, an Officer Who Retains an Individual's License While Proceeding with Unrelated Investigatory Questioning Has "Seized" That Individual Within the Meaning of the Fourth Amendment.

This Court has long recognized that police-citizen interactions that begin as consensual encounters may transform into investigative detentions subject to Fourth Amendment protections. *See Bostick*, 501 U.S. at 438 (noting that Fourth Amendment scrutiny is triggered when

an encounter "loses its consensual nature"); *Mendenhall*, 446 U.S. at 554. Such a transformation occurs at the point at which, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *Mendenhall*, 446 U.S. at 554). This test is an objective one, based on how a reasonable person would view the encounter. *See California v. Hodari D.*, 499 U.S. 621, 628 (1991). To constitute a seizure, the totality of the circumstances must illustrate that the encounter between the officer and citizen involved such a show of authority on the part of the officer, that a reasonable person would not have felt free to decline the officer's requests or terminate the encounter. *Bostick*, 501 U.S. at 434.

Applying these standards, several circuits have correctly recognized that no objective, reasonable person would feel free to terminate a police encounter once the police have retained that person's identification as leverage to inquire into unrelated, potentially criminal matters.

1. This Court's opinions in *Royer* and *Mendenhall* provide the clearest evidence that, under the Fourth Amendment, unwarranted retention of an individual's identification transforms a police encounter into a constitutionally protected seizure.

Royer represents this Court's most recent exploration of the constitutional ramifications of retained identification. In that case, two police detectives approached an individual, Royer, in the concourse of a Florida airport. 460 U.S. at 493–494.

Upon their request, Royer provided the police with his driver's license and airplane ticket. *Id.* at 494. After reviewing the license and asking Royer a few questions about it, the police did not return Royer's identification. *Id.* Instead, the detectives informed Royer that they suspected him of transporting narcotics and asked Royer to accompany them to a nearby room adjacent to the concourse. *Id.* Royer silently followed the officers and waited as they retrieved his luggage from the airline. *Id.* The officers then requested Royer's consent to search the luggage, to which Royer responded by opening one of the bags. *Id.* The ensuing search of both bags yielded drugs, for which Royer was subsequently charged with and convicted of felony possession of marijuana. *Id.* at 494–495.

Royer's conviction was reversed by the Florida District Court of Appeal, which determined that Royer had been unlawfully detained when his consent to search the bags was secured, rendering the search unconstitutional under the Fourth Amendment. *Id.* at 495–496. As a result, the central issue in the government's appeal to the Supreme Court mirrored the issue in this case: whether, under the circumstances, the interaction between an individual and the police had escalated into an involuntary detention. *Id.* at 495–497.

The *Royer* plurality began by enunciating the general premises that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him

if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions"—premises petitioner does not dispute. *Id.* at 497. The Court then observed that the police officers' "[a]sking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves," *id.* at 501, a position this Court has since reaffirmed. *See, e.g.*, *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004) (citing *Delgado*, 466 U.S. at 216). Nevertheless, the Court held that at the time the officers "asked Royer to accompany them to the police room, *while retaining his ticket and driver's license and without indicating in any way that he was free to depart*, Royer was effectively seized for the purposes of the Fourth Amendment. 460 U.S. at 501–502 (emphasis added). In such circumstances, the Court recognized, no reasonable person would feel free to leave. *Id.* at 502 (citing *Mendenhall*, 446 U.S. at 554).

To reach such a holding, the Court was forced to distinguish its decision in *Mendenhall*, which found no Fourth Amendment seizure in a factually-similar case. In order to do so, the Court relied heavily upon the factors that have led several circuits to adopt petitioner's categorical rule—police questioning during the retention of personal identification, coupled with the failure to inform the individual that they remain free to leave, transformed the initially-voluntary encounter into a seizure. Several times, the Court highlighted the central importance of these factors. *Id.* at 501–502 (identifying moment of transformation based on police requests made "while retaining [Royer's] ticket and driver's license and without indicating in any way that he was free to

depart"); *Id.* at 503 n.9 (distinguishing *Mendenhall* because "Royer's ticket and identification remained in the possession of the officers throughout the encounter" and the officers "made no effort to advise him that he need not consent to the search"). Indeed, the Court expressly noted that "by returning his ticket and driver's license, and informing him that he was free to go if he so desired, the officers might have obviated any claim that the encounter was anything but a consensual matter from start to finish." *Id.* at 504.

Placing such primacy upon retention of a person's identification reflects the common-sense fact that *no objective, reasonable person* will feel free to terminate a police encounter if the police retain the person's identification rather than returning it after establishing the person's identity. As the D.C. Circuit explained, *Royer* is rooted in the recognition that "abandoning one's driver's license (or other papers such as a passport, green card, or ticket if still in transit) is simply not a practical or realistic option for a reasonable traveler in this day and age." *Jordan*, 958 F.2d at 1087. Thus, if the police proceed with an investigation while they retain, rather than return, an individual's license, then a reasonable person in those circumstances will simply not believe themselves free to leave. *See, e.g.*, *Thompson*, 712 F.2d at 1359. Perhaps the police can obviate that conclusion by explaining that the individual retains the freedom to terminate the encounter, *see Royer*, 460 U.S. at 504, but absent such an explanation, the reasonable person will believe himself to be detained.

Thus, this Court's decision in *Royer*, when considered in contrast to its holding in *Mendenhall*, strongly support the rule advocated below by the petitioner and already adopted in several circuits.

2. Finally, adoption of petitioner's position in no way contradicts this Court's instruction in *Bostick* that courts must consider all the circumstances surrounding an encounter, rather than "elevat[ing] one factor above all others in determining whether a seizure has occurred." *Contra Weaver*, 282 F.3d at 313. Petitioner agrees that any seizure inquiry necessarily requires consideration of multiple factors, and that it will be rare that any one factor will produce "an inexorable conclusion that a seizure has occurred." *Jordan*, 958 F.2d at 1086. *But see id.* at 1086 n.1 (noting that drawn firearms, standing alone, would likely communicate to any reasonable person that he is not free to leave).

Petitioner's test, however, is not based on any single factor. Rather, it is based on the reasonable observer's response to a repeatable *combination* of factors: (1) the police's retention of an individual's identification, coupled with (2) the police's decision to engage in unrelated investigatory acts. It is the interoperation of these factors, not any one of them in isolation, that has inspired courts to find seizures:

> Asking for and examining [a detainee's] ticket and his driver's license were no doubt permissible in themselves, but when the officers . . . asked him to accompany them to the police room, *while retaining his ticket and driver's license* and without indicating

> in any way that he was free to depart, [the detainee] was effectively seized for the purposes of the Fourth Amendment.

Jordan, 958 F.2d at 1087 (quoting *Royer*, 460 U.S. at 501). The manner in which these factors interrelate is objective and predictable, such that whenever they are present a Fourth Amendment seizure has occurred.

III. The Instant Case Provides an Effective Vehicle Through Which the Court Can Resolve a Question of National Importance.

1. Standing alone, the substantial disagreement among the lower courts is enough to warrant this Court's intervention. Over twenty-five years have passed since *Royer*, when this Court last addressed the issues presented by this petitioner in meaningful detail. During that time, the courts of appeals have candidly acknowledged that they stand in conflict. *See, e.g.*, Pet. App. 12a (joining Fourth Circuit in rejecting D.C. Circuit rule); *Weaver*, 282 F.3d at 313 (rejecting then-current rule of Fifth, Seventh, Eleventh, and D.C. Circuits). Various district courts have similarly noted the persistent contours of this circuit split. *See, e.g.*, *United States v. Maine*, No. 3:01-00096, 2008 WL 686215, at *13 (M.D. Tenn. Mar. 5, 2008); *Franklin v. Montgomery County*, No. 2005-0489, 2006 WL 2632298, at *9–10 (D. Md. Sept. 13, 2006).

Although the test for determining whether an individual has been seized is flexible, it nevertheless

"calls for consistent application from one police encounter to the next." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). Therefore, this Court should provide guidance in order to assure that the Fourth Amendment is uniformly applied throughout the country. With a majority of circuits having weighed in on the question, and with no clear resolution in sight, it is unreasonable to expect a resolution in this debate unless this Court chooses to provide it.

2. The need for this Court's review is heightened given the importance of the question presented. Unlike many Fourth Amendment issues, which raise concerns only relevant in cases involving persons whom the police, at minimum, reasonably suspect to be involved in criminal activity, the instant case seeks to further define the permissible boundaries of "voluntary" or "consensual" encounters between ordinary persons and the police.

In many of the cases weighing in on this issue, including the court below, the government has conceded or the court has held that the officers initially approached the subjects without any reasonable suspicion of criminal activity. *See* Pet. App. 5a ("The Government concedes . . . that the Officers lacked the reasonable suspicion required for a seizure."); *Jordan*, 958 F.2d at 1088–1089 ("[T]he police acknowledged they lacked even that quantum of articulable suspicion that would have made a brief *Terry*-style detention reasonable."); *Lopez*, 443 F.3d at 1283 ("[T]he government has conceded Jackson did not have reasonable articulable suspicion to support an investigative detention."); *see also Thompson*, 712 F.2d at 1361 ("Applying an objective

test, we conclude that the facts of which [the officer] was aware when he retained Thompson's driver's license were insufficient to support a reasonable suspicion of criminal activity."); *Chavez-Villarreal*, 3 F.3d at 127. The Fourth Amendment cannot countenance a rule that permits ordinary persons to be detained without legal basis and permits the police to use voluntarily offered identification as leverage to induce or coerce participation in more prolonged questioning.

This concern is exacerbated by the central importance personal identification—the driver's license, in particular—plays in modern society. Under the rule adopted by the First Circuit below, ordinary persons are expected to willingly abandon such papers if they wish to terminate a "voluntary" police encounter after the police have chosen to retain them. Indeed, petitioner expressly requested the return of his license and was rejected. Pet. App. 47a. Yet, as the D.C. Circuit recognized over a decade ago, abandonment of a driver's license or other similar papers "is simply not a practical or realistic option . . . in this day and age." *Jordan*, 958 F.2d at 1087; *see also People v. Jackson*, 39 P.3d 1174, 1189 (Colo. 2002) ("The need for identification is pervasive in today's society, and a reasonable person would not consider abandoning his identification a practical option[.]"). Photo identification is required for any number of common everyday tasks, from cashing checks or using credit cards to boarding planes or entering government buildings. Indeed, possession of identification is so central to modern life that this Court recently permitted the states to require it as a precondition to

exercising the right to vote. *See Crawford v. Marion County Elec. Bd.*, 533 U.S. ___, 128 S. Ct. 2897 (2008).

The ubiquitous need for personal identification renders it increasingly unreasonable for police to manipulate such identification, when voluntarily provided, in order to further police questioning. For the same reasons, it makes prompt resolution of the question presented increasingly valuable to the general population, who presently lack guidance regarding the scope of their rights when police appear to present them with the untenable choice of either "consenting" to an investigation or losing their license.

3. Finally, this case provides the Court with a clean vehicle for resolving the conflict among the circuits and answering the question presented. All parties stipulated before the district court that the police lacked even the reasonable suspicion necessary to justify a limited investigatory detention. Pet. App. 5a. Therefore, unless the interactions between Mr. Ford and the police *never* escalated into a Fourth Amendment seizure, Mr. Ford's conviction must be set aside. The question presented is thus squarely presented by, and wholly controls, this case.

CONCLUSION

For the reasons provided above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 20, 2009

APPENDIX

APPENDIX A
Opinion of the United States Court of Appeals for the First Circuit

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UNITED STATES,
Appellee,

v.

Tyson FORD,
Defendant, Appellant.

No. 07-2613.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

548 F.3d 1

Heard Oct. 6, 2008.
Decided Nov. 5, 2008.

Allison J. Koury was on brief, for appellant.

Jack W. Pirozzolo, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief, for appellee.

Before BOUDIN, STAHL, and HOWARD, Circuit Judges.

STAHL, Circuit Judge.

Defendant-Appellant Tyson Ford appeals his conviction under the felon-in-possession statute, 18 U.S.C. § 922(g)(1). His main complaint is that the district court erred in denying his motion to suppress a firearm found on his person because it was obtained during an unconstitutional search and seizure. Finding no error, we affirm the conviction.

I. Background

We relate the facts "'as the trial court found them, consistent with record support.'" *United States v. Ruidiaz*, 529 F.3d 25, 27 (1st Cir. 2008) (*quoting United States v. Lee*, 317 F.3d 26, 30 (1st Cir. 2003)). On September 8, 2005, Officers Daran Edwards and Daniel Griffin ("the Officers") of the Boston Police Department ("BPD") were on a routine patrol in a high-crime area of Dorchester, Massachusetts. The Officers were in uniform and in a marked police cruiser. They regularly patrolled the Dorchester area and were familiar with many of the area's residents. At approximately 3:00 p.m., the Officers observed Ford, who they did not recognize, walking alone down Harvard Street. Ford looked over his shoulder, observed the cruiser and then lowered his head, began walking rapidly, and turned right onto Gleason Street. The Officers followed Ford the wrong way up Gleason Street for a short distance, ostensibly to conduct a Field Intelligence and Observation Report (FIO), used by BPD police officers for intelligence collection.

Upon coming abreast of Ford, Officer Griffin leaned out of the passenger side window and asked him, "Can I speak to you for a minute?" Ford stopped

walking, took his identification out of his front pocket, and voluntarily handed it to Officer Griffin. He told the Officers he had no outstanding warrants and was not on probation. While Officer Edwards ran a search for warrants using the BPD database, Officer Griffin continued to ask Ford questions like "where do you live?" and "where are you headed?" Officer Griffin observed that Ford appeared annoyed, nervous, and hostile at times and that he was breathing rapidly, stuttered his words, and his hands shook. Officer Griffin asked Ford whether he had anything on him that the Officers needed to know about. Ford answered in the negative.

Roughly 45 seconds after taking Ford's driver's license, Officer Griffin exited the cruiser to complete the FIO. Following BPD protocol, Officer Edwards also exited, walked behind the cruiser, and approached Ford from the same direction as Officer Griffin. Neither Officer unholstered his weapon. Ford raised his hands into the air and said, "Come on man, what's this all about?" Officer Griffin asked whether Ford had any weapons on his person. Ford responded, "Yeah, I got a gun in my pocket, but it don't fire." The Officers then placed Ford in handcuffs, and Officer Griffin frisked him, discovering and seizing a Grendel, Inc., P-12 .380 semiautomatic handgun from the pocket of Ford's pants. The Officers arrested Ford, the entire encounter lasting approximately two to three minutes from interception to arrest. Before placing Ford in handcuffs, neither Officer had touched Ford, drawn his weapon, or told Ford he was not free to leave nor had the Officers activated the police cruiser's siren or flashing lights.

On November 1, 2005, a single-count complaint charged Ford as a felon-in-possession of a handgun in violation of 18 U.S.C. § 922(g)(1). On March 3, 2006, Ford moved to suppress the evidence seized in the warrantless search of his person, contending he was seized at the time the Officers exited the vehicle in violation of his Fourth Amendment rights. On July 20, 2006, the district court denied the motion and issued a well-reasoned rescript, finding that the Officers had not seized Ford prior to his incriminating statement. *See United States v. Ford*, 440 F.Supp.2d 16 (D. Mass. 2006).

On October 4, 2006, Ford entered a conditional plea of guilty, *see* Fed. R. Crim. P. 11(a)(2), reserving his right to appeal the denial of his suppression motion. On October 11, 2006, the district court sentenced Ford to a term of imprisonment of 15 years under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). Ford now appeals the denial to suppress the handgun and his conviction.[1]

II. Discussion

A. The Motion to Suppress

This appeal primarily concerns the boundary delineating casual encounters with police, as when officers question persons in public places, from

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[1] Ford dropped his appeal of his sentence enhancement under Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

seizures requiring probable cause or articulable suspicion. *See United States v. Young*, 105 F.3d 1, 5-6 (1st Cir. 1997). Ford challenges the lower court's denial of his motion to suppress in which he argued the Officers seized him before possessing the requisite reasonable suspicion. The Government concedes, and we accept for the purposes of this review, that the Officers lacked the reasonable suspicion required for a seizure and that, if a seizure occurred, the handgun found on Ford's person "must be suppressed as tainted fruit." *See Florida v. Bostick*, 501 U.S. 429, 433-34, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

"Our review of a district court's denial of a suppression motion is bifurcated." *United States v. Cardoza*, 129 F.3d 6, 13 (1st Cir. 1997). We review the court's factual findings for clear error and its legal conclusions (including constitutional determinations) de novo. *Ruidiaz*, 529 F.3d at 28. Clear error "'exists only if, after considering all of the evidence, we are left with a definite and firm conviction that a mistake has been made.'" *Young*, 105 F.3d at 5 (*quoting United States v. McCarthy*, 77 F.3d 522, 529 (1st Cir. 1996)). This deference "reflects our awareness that the trial judge . . . sits in the best position to determine what actually happened." *Id.*

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV. The primary purpose of the Fourth Amendment is "'to prevent arbitrary and

oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *I.N.S. v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984) (*quoting United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)).

Not every interaction between a police officer and a citizen constitutes a seizure triggering Fourth Amendment protections. *Bostick*, 501 U.S. at 434, 111 S.Ct. 2382; *Cardoza*, 129 F.3d at 14; *Young*, 105 F.3d at 5. While per se rules are inappropriate in determining when a seizure occurs for Fourth Amendment purposes, *United States v. Drayton*, 536 U.S. 194, 201, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002) (*citing Bostick*, 501 U.S. at 439, 111 S.Ct. 2382), we have observed that encounters "between law enforcement officials and citizens generally fall[ ] within three tiers of Fourth Amendment analysis, depending on the level of police intrusion into a person's privacy." *Young*, 105 F.3d at 5. Because there are no bright-line distinctions between the tiers, we look to the totality of the circumstances to determine where a police encounter falls. *Drayton*, 536 U.S. at 207, 122 S.Ct. 2105; *Michigan v. Chesternut*, 486 U.S. 567, 572, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *United States v. Smith*, 423 F.3d 25, 29-30 (1st Cir. 2005); *Cardoza*, 129 F.3d at 15. *See also Bostick*, 501 U.S. at 439-40, 111 S.Ct. 2382 (rejecting per se rule for seizure in favor of totality inquiry).

The lowest tier, which does not implicate the Fourth Amendment, involves minimally intrusive interactions such as when police officers approach

individuals on the street or in public places to ask questions. *Young*, 105 F.3d at 5-6; *Bostick*, 501 U.S. at 434, 111 S.Ct. 2382. *See Drayton*, 536 U.S. at 201, 122 S.Ct. 2105 (observing that law enforcement agents may question and ask a citizen for identification even when they have no basis to suspect the individual so long as they "do not induce cooperation by coercive means"). If the encounter amounts to more than a minimally intrusive interaction, a seizure occurs, either a *de facto* arrest requiring probable cause or an investigative (or *Terry*) stop necessitating reasonable suspicion. *Young*, 105 F.3d at 6.

The Supreme Court has adopted the standard set forth by Justice Stewart's plurality opinion in *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[2] *See Drayton*, 536 U.S. at 202, 122 S.Ct. 2105; *California v. Hodari D.*, 499 U.S. 621, 627-28, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (compiling cases). To constitute seizure, this Circuit requires one's liberty be restrained by either physical force or an assertion of authority. *Id.* at 626, 111 S.Ct. 1547; *United*

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[2] The Court has explained the reasonable person test presumes an innocent person. *Bostick*, 501 U.S. at 438, 111 S.Ct. 2382; *Smith*, 423 F.3d at 31, n. 5.

States v. Sealey, 30 F.3d 7, 9 (1st Cir. 1994); *see Smith*, 423 F.3d at 28 (finding seizure can occur without physical restraint if compliance is coerced and not voluntary).

Under the objective totality of the circumstances standard, we look not to "whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Hodari D.*, 499 U.S. at 628, 111 S.Ct. 1547; *Chesternut*, 486 U.S. at 574, 108 S.Ct. 1975 (noting objective standard does not vary with mind of each individual). Thus, there is less reason to inquire into a defendant's subjective mindset when considering whether there is a submission to authority, *see Cardoza*, 129 F.3d at 14 n. 4, particularly as all persons feel "some degree of compulsion" and "discomfort" when approached by police officers. *Smith*, 423 F.3d at 28.[3]

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[3] Both the Supreme Court and this Circuit have observed that exchanges do not lose their consensual nature simply because people generally answer police officers' questions. *Drayton*, 536 U.S. at 205, 122 S.Ct. 2105 (*citing Delgado*, 466 U.S. at 216, 104 S.Ct. 1758); *Cardoza*, 129 F.3d at 16 (agreeing with defendant that "few people . . . would ever feel free to walk away from any police question"). *See id.* ("The 'free to walk away' test . . . must be read in conjunction with the Court's frequent admonitions

(continued...)

Employing this objective test, the inquiry before us today is not whether the Officers could approach and question Ford, but, instead "whether they did so in a manner that would have communicated to a reasonable person that he was not free to refuse to answer and walk away." *Smith*, 423 F.3d at 29. To elucidate this test, the Supreme Court has provided circumstances that may indicate a seizure including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870. "[T]his list of factors is not exhaustive and no single factor is dispositive in any case." *Smith*, 423 F.3d at 29. *See Chesternut*, 486 U.S. at 575, 108 S.Ct. 1975 (considering also non-use of patrol car's siren or flashers); *United States v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005) (adding neighborhood as "only one factor that must be looked at alongside all the other circumstances").

To evaluate the circumstances leading to Ford's arrest, our case law provides guidance for discerning the Fourth Amendment's parameters. In *Cardoza*,

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that 'a seizure does not occur simply because a police officer approaches an individual and asks a few questions'") (*quoting Bostick*, 501 U.S. at 434, 111 S.Ct. 2382, and *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

police officers drove the wrong way on a one-way street to ask the defendant pointed questions including "Why are you out at this time of night?" 129 F.3d at 15. We found no seizure, noting the police had not used the cruiser's siren or lights, had stopped at the curb before calling out to the defendant, and did not exit the car until they observed the defendant's ammunition round. *Id.* at 16. *Cf. Chesternut*, 486 U.S. at 575, 108 S.Ct. 1975 (no seizure where police did not activate siren or lights, did not order defendant to halt, drew no weapons, and did not block defendant's course).

In *Smith*, the police officers framed general, nonthreatening questions to ask why the defendant was sitting on the wall of a stranger's house and did not command the defendant to remain on his walled perch. 423 F.3d at 30. Even after the officers exited their vehicle to conduct an FIO and approached the defendant from both sides, we found no seizure because the officers never summoned Smith to the cruiser, did not employ the car's siren or lights, and did not expose their weapons or touch Smith. *Id.* Additionally, because Smith attempted to flee from the officers after he disclosed that he had an outstanding warrant, we noted his action indicated he had not submitted to an assertion of authority. *Id.* at 31.

Applying this precedent to the instant case, we decline to hold that the Officers seized Ford before he disclosed that he was in possession of a firearm. *See Mendenhall*, 446 U.S. at 555, 100 S.Ct. 1870 (rejecting proposition that making statements contrary to one's self-interest necessarily indicates

involuntary submission). The Officers, like those in *Cardoza*, drove a short distance the wrong way on Gleason Street for the purpose of asking Ford questions but activated neither the cruiser's siren or flashing lights. Their questions were largely general and non-threatening, like those in *Smith*. Throughout the brief encounter, until Ford's incriminating statement, the Officers did not draw their guns or touch Ford.

At the onset of the interaction, Ford approached the cruiser and provided his driver's license voluntarily. While the Officers retained the license during the two- to three-minute exchange, they did not otherwise restrict Ford's movement. *Contrast Smith*, 423 F.3d at 27, 30 (finding no seizure where officers approached the defendant from both sides, telephone pole was directly in front of defendant, and wall directly behind). As in *Smith*, where we found no seizure, the Officers exited the cruiser to complete the FIO.

Ford relies on the Supreme Court's *Florida v. Royer* decision where two detectives retained the defendant's driver's license and airplane ticket while commanding him to accompany them to a private room because they believed he fit the drug courier profile. 460 U.S. 491, 493-94, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The Court held these actions constituted an illegal seizure, id. at 501-02, 103 S.Ct. 1319, and distinguished *Mendenhall* in part because the government agents there immediately returned the driver's license and airplane ticket before continuing the encounter. *Id.* at 503 n. 9, 103 S.Ct. 1319.

Ford argues *Royer* indicates that the retention of his driver's license during the encounter is compelling evidence of a seizure. We think the concerns of the airport cases, where citizens need documentation to move from place to place, differ from the instant case where Ford was on foot on a public street. *See Drayton*, 536 U.S. at 204, 122 S.Ct. 2105 (noting that if the encounter had occurred on the street rather than on a bus, "[i]t is beyond question that ... it would be constitutional"). Moreover, Ford produced his license voluntarily, not at the request of one of the Officers, and was not removed from the street to a confined space while the Officers ran the background check.

While the retention of Ford's license is an important factor in our analysis, we decline to elevate it above other considerations. *See United States v. Weaver*, 282 F.3d 302, 313 (4th Cir. 2002) (refusing to adopt D.C. Circuit's per se rule regarding license retention). Ford also asserts that a seizure can be evidenced by his raising his hands into the air after the Officers exited the cruiser. But one can draw different inferences from this gesture; while it could reflect submission, raised hands also can be a symbol of protest. On the cold record before us,[4] we cannot recreate the actual gesture

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[4] At the suppression hearing, Officer Edwards demonstrated the exact manner in which Ford raised his hands and later explained that Ford "raised his hands in the air." Officer Griffin

(continued...)

demonstrated to the district court. Instead, this type of inquiry recommends our deferential review of the lower court's factual findings.[5]

Evaluating the totality of circumstances, we hold that Ford was not seized for purposes of the Fourth Amendment protections when he told the Officers he possessed a handgun. Assessments of this type "are highly fact-specific and must be performed on a case-

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similarly testified twice that Ford "raised his hands." Ford did not testify. We note that this record does not support the suggestion initially posited by Ford that he raised his hands above his head.

[5] Ford also suggests that the Officer's failure to inform him of his right to refuse to answer questions and to leave rendered the encounter nonconsensual. While it is true that such statements generally make an encounter consensual, *Mendenhall*, 446 U.S. at 558-59, 100 S.Ct. 1870, the Supreme Court has explained that a seizure determination "is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed." *Id.* at 555, 100 S.Ct. 1870. *See also Drayton*, 536 U.S. at 206, 122 S.Ct. 2105 ("The [Supreme] Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.").

by-case basis." *United States v. Taylor*, 511 F.3d 87, 92 (1st Cir. 2007). We acknowledge this method of analysis does not produce a crystalline landscape in our Fourth Amendment jurisprudence. But it reflects most realistically the contextual nature of these encounters. *See Chesternut*, 486 U.S. at 573, 108 S.Ct. 1975 ("The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.").

B. Other Issues

Ford contests his conviction under 18 U.S.C. § 922(g)(1), asserting that the handgun on his person did not fall under the statutory definition of "firearm" because it was inoperable. The Government argues that Ford waived this argument by entering a conditional plea of guilty, reserving only his objection to the suppression order. Fed. R. Crim. P. 11(a)(2). Regardless of the standard of review we employ, Ford's claim is without merit.

"The term 'firearm' means (A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by action of an explosion." 18 U.S.C. at § 921(a)(2). We have recognized that, in order to convict, "the gun must be real, but it 'need not be prove[d] to be loaded or operable.'" *United States v. Taylor*, 54 F.3d 967, 975 (1st Cir. 1995) (*quoting United States v. Kirvan*, 997 F.2d 963, 966 (1st Cir. 1993)). *See also United States v. Alston*, 112 F.3d 32, 38 (1st Cir. 1997). No one, including Ford, suggests the handgun he carried was

not real or that it was not designed to expel a projectile. Ford's argument thus fails.

Finally, Ford's argument that his prior convictions should be treated as an element of the enhanced offense, and thus proven by the Government beyond reasonable doubt, is foreclosed by *Almendarez- Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and our Circuit's subsequent case law.

III. Conclusion

For the foregoing reasons, we affirm the district court's denial of Ford's motion to suppress and Ford's conviction under 18 U.S.C. § 922(g)(1).

APPENDIX B
Opinion of the United States District Court for the District of Massachusetts

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UNITED STATES of America,

v.

Tyson FORD,
Defendant.

Criminal No. 05–10326–JLT.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

440 F. Supp. 2d 16

July 20, 2006.

Albert F. Cullen, Jr., South Boston, MA, for Tyson Ford.

Jack W. Pirozzolo, United States Attorney's Office, Boston, MA, for United States of America.

MEMORANDUM

TAURO, District Judge.

Defendant Tyson J. Ford is charged with being a convicted felon in possession of a firearm.[1] Defendant has moved to suppress the firearm seized by Officers Daran Edwards and Daniel Griffin of the Boston Police Department and to suppress certain statements that Defendant made to the officers. For the following reasons, Defendant's Motion to Suppress is DENIED.

Background

On September 8, 2005, Boston Police Department ("BPD") Officers Daran Edwards ("Edwards") and Daniel Griffin ("Griffin") were on routine patrol in the Dorchester section of Boston, Massachusetts. Both officers were in uniform and driving a marked Boston police cruiser.[2] Around 3:00 p.m. in the afternoon, the officers drove towards the intersection of Harvard Street and Gleason

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[1] *See* 18 U.S.C. § 922(g)(1) ("It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess in or affecting interstate commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

[2] A "marked cruiser" is a police vehicle labeled on both sides with "Boston Police Department" and which is equipped with a siren and flashing blue lights.

Street in Dorchester. The BPD has deemed this neighborhood a "hot spot" for criminal activity. The neighborhood has a high rate of firearm arrests, violent crime arrests, drug arrests, gang activity, and "shots fired" incidents. Officers Edwards and Griffin regularly patrolled this area and were familiar with most of the residents of the neighborhood.

As Officers Edwards and Griffin approached the Harvard–Gleason area, they observed Defendant walking alone down Harvard Street towards Gleason Street. Neither Officer Edwards or Officer Griffin recognized Defendant. Defendant, looking over his shoulder, observed the officers' police cruiser traveling in his direction. Defendant immediately looked down, sped up, and then quickly changed his direction, turning off of Harvard Street and on to Gleason Street. The officers, still in their marked cruiser, followed Defendant on to Gleason Street and pulled the cruiser to the curb alongside Defendant in order to conduct a Field Intelligence and Observation Report ("FIO").[3] The officers did not physically block Defendant's path.

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[3] An FIO is routinely compiled by patrol officers, during which the officers record a person's name, nickname, address, date of birth, social security number, physical characteristics, and other relevant information. Compliance with an officer's request for

(continued...)

Officer Griffin leaned out of the cruiser's passenger side window and asked Defendant "[c]an I speak to you for a minute?" Defendant stopped walking, took his identification out of his front pocket, and voluntarily handed his identification to Officer Griffin. Defendant then told the officers that he had no outstanding warrants and that he was not on probation. Officer Edwards took Defendant's identification and initiated a search of the BPD computer database to determine whether Defendant had any outstanding warrants. While Officer Edwards waited for the results of the search, Officer Griffin continued to ask Defendant various routine questions, such as "[w]here do you live?" and "[w]here are you headed?" During this brief interaction, the officers observed Defendant's rapid breath, stuttered words, and trembling hands. Although Defendant answered all of Officer Griffin's questions, the officers described Defendant as annoyed, hostile, and, on the basis of the above mentioned observations, extremely nervous. Officer Griffin then asked Defendant "[d]o you have anything on you we need to know about?" Defendant replied "no."

Officer Griffin then exited the cruiser to complete the FIO. Officer Edwards also exited, walked around the back of the car and approached Defendant from the same side as Officer Griffin.

FIO information is voluntary. *See United States v. Smith*, 423 F.3d 25, 27 n.1 (1st Cir. 2005).

Defendant, at this point, began shaking more severely and raised his hands above his head, asking "[c]ome on man, what's this all about?" Officer Griffin again asked Defendant whether he had any weapons on him. Defendant answered "[y]eah, I got a gun in my pocket, but it don't fire." Officers Edwards and Griffin then placed Defendant in handcuffs and Officer Griffin frisked him. Officer Griffin discovered and seized a Grendel, Inc., P–12.380 semiautomatic handgun from the pocket of Defendant's pants. The officers then arrested Defendant. The firearm was not loaded and subsequent testing confirmed that the firearm was in fact inoperable.[4]

The entire encounter between the officers and Defendant lasted approximately two to three minutes. Neither officer physically touched Defendant before placing him in handcuffs, neither officer drew his weapon, and neither officer told Defendant that he was not free to leave. The officers, furthermore, never activated the police cruiser's siren or its flashing blue lights.

On August 18, 2005, the BPD posted a message on the BPD internal intranet "weblog" bulletin stating that Defendant may be in possession of a .380 caliber handgun. All Boston Police Officers had

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[4] Although the firearm was inoperable, the firearm seized from Defendant satisfies the requirements of 18 U.S.C. § 922.

access to this bulletin through computers in the Boston Police Stations. Officer Edwards saw this bulletin at some point before his September 8, 2005 encounter with Defendant. Officer Edwards testified, however, that he did not remember the bulletin at any time before or during the encounter with Defendant.

Discussion

The issues presented by Defendant's motion are two-fold. The first issue is whether Officers Griffin and Edwards seized Defendant before he made the incriminating statement and before they seized the firearm. The second issue depends upon the resolution of the first—that is, whether the officers, if they did seize Defendant, had sufficient reasonable suspicion to justify the seizure under the Fourth Amendment to the United States Constitution.[5]

The Fourth Amendment protects all people against unreasonable searches and seizures.[6] The

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[5] *See, e.g., Terry v. Ohio*, 392 U.S. 1, 27–28, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (holding that reasonable suspicion of criminal activity is sufficient to justify a brief investigatory stop).

[6] U.S. Const. Amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

(continued...)

Fourth Amendment, however, is not implicated every time a police officer encounters a citizen in a public place.[7] In fact, "'[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.'"[8] "'Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.'"[9]

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affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[7] *See Smith*, 423 F.3d at 28 ("While the Fourth Amendment protects against unreasonable searches and seizures, not all encounters between law enforcement officers and citizens constitute seizures.").

[8] *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (*quoting Terry*, 392 U.S. at 34, 88 S.Ct. 1868 (White, J., concurring)); *see also Smith*, 423 F.3d at 28; *United States v. Young*, 105 F.3d 1, 5–6 (1st Cir. 1997) ("Police may approach citizens in public spaces and ask them questions without triggering the protection of the Fourth Amendment.").

[9] *Smith*, 423 F.3d at 28 (*quoting United States v. Drayton*, 536 U.S. 194, 200–01, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002)).

The hallmark of a Fourth Amendment seizure is coercion.[10] A police- citizen encounter rises to the level of a seizure when the interaction is compelled by physical restraint or a nonphysical show of authority, rather than by the citizen's voluntary compliance.[11] A certain degree of compulsion is inherent when a law enforcement officer confronts someone with questions.[12] Courts, therefore, apply an objective standard to determine whether an encounter was sufficiently coerced to rise to the level of a seizure.[13] That standard is that "[n]o seizure occurs when officers approach a citizen to ask a question unless it was objectively reasonable for that person to believe that he was compelled to stay and answer the question."[14] Stated another way, a seizure occurs only when the totality of the circumstances illustrates that a reasonable person

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[10] *Id.*

[11] *Id.*

[12] *Id.* ("[S]ince most tend to feel some degree of compulsion when confronted by law enforcement officers asking questions, such discomfort cannot be the measure of a Fourth Amendment seizure.").

[13] *Id.* (*citing Mendenhall*, 446 U.S. at 553, 100 S.Ct. 1870).

[14] *Id.* (*citing Mendenhall*, 446 U.S. at 553, 100 S.Ct. 1870).

would not have felt free to terminate the conversation and leave the encounter.[15]

The United States Supreme Court has designated several factors to guide a court's evaluation of whether a seizure occurred in a given situation.[16] Factors that might elevate a police encounter from a voluntary conversation to a seizure include the threatening presence of several officers, the display of the officers' weapons, any physical touching of the defendant, and the use of language or tone of voice that indicates that compliance with the officers' request is not discretionary.[17] These factors are not exclusive, however, and no single factor is dispositive.[18] Courts, instead, will examine all of the facts surrounding a particular situation to determine whether a reasonable person would have felt free to leave.[19]

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[15] *See id.* at 28–29 (*citing INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984)); *Young*, 105 F.3d at 6 (*citing Florida v. Bostick*, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)).

[16] *Smith*, 423 F.3d at 29 (*citing Mendenhall*, 446 U.S. at 554–55, 100 S.Ct. 1870).

[17] *Id.* (*citing Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870).

[18] *Id.*

[19] *See id.* (*citing Bostick*, 501 U.S. at 439, 111 S.Ct. 2382).

The First Circuit Court of Appeals has considered facts similar to the present case in two cases which serve as useful guides in the resolution of the instant motion.[20] In *United States v. Young*, two Boston Police officers on patrol in a marked cruiser observed three men, who were standing together, quickly disperse upon seeing the police cruiser.[21] The officers noted that the defendant matched the description of a suspect in a robbery that occurred in the area.[22] The officers followed the defendant, pulled their cruiser to the curb alongside him, and stated "Boston Police, you got a minute?"[23] The defendant replied "[s]ure" and stepped towards the cruiser.[24] The First Circuit held that the officers did not seize the defendant and that the encounter, up to that point, did not trigger the protections of the Fourth Amendment.[25] The court explained that "in the absence of an officer's exertion of physical force

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[20] *See id.* at 26–32; *Young*, 105 F.3d at 4–8.

[21] *Young*, 105 F.3d at 4.

[22] *Id.* at 5.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 6. In this case, the Government conceded that a Fourth Amendment seizure occurred when one of the officers lunged at the defendant, after observing a handgun in the defendant's waistband, and made brief contact with the defendant's jacket. *See id.*

or an individual's submission to a show of authority, no seizure occurs."[26]

In *United States v. Smith*, two Boston Police officers were on patrol in a marked Boston police cruiser when they noticed the defendant, Smith, sitting on a small wall behind a telephone pole.[27] A chain link fence stood directly behind the defendant.[28] Both officers regularly patrolled this area and were familiar with the local residents.[29] Neither officer recognized the defendant.[30] One of the officers leaned outside of the cruiser's passenger side window and asked the defendant whether he lived at the house behind him.[31] The defendant stated that he did not live there.[32] After a few more questions, the officers exited their cruiser and approached the defendant to complete a FIO.[33] The officers stood on either side of the telephone pole that was directly in front of the defendant.[34] The

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[26] *Id.* (*citing United States v. Sealey*, 30 F.3d 7, 10 (1st Cir.1994) (finding no seizure occurred where police officers in a cruiser simply approached defendant and yelled "Hey Steven, what's up?")).

[27] 423 F.3d at 26. 28.

[28] *Id.* at 26-27.

[29] *Id.* at 27.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

officers asked the defendant for his identification, which the defendant produced.[35] Then, as one of the officers started back to the cruiser to run the defendant's name through the police database, the defendant stated that he had an outstanding warrant.[36] After a brief scuffle, the officers then arrested the defendant and found a firearm in his possession.[37]

The issue in *Smith*, as in the instant case, was whether the defendant was seized before he admitted to the outstanding warrant.[38] On these facts, the First Circuit held that the officers did not seize the defendant prior to his arrest.[39] Particularly relevant to the court's holding were the facts that the officers did not activate the cruiser's sirens or lights, they did not affirmatively summon the defendant to the cruiser, they did not draw their weapons, they never physically restrained or touched the defendant, they did not accuse the defendant of committing a crime, they did not question the defendant about any specific event, and their questions were "general and non-threatening."[40] The

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 29.
[39] *Id.* at 30.
[40] *Id.* at 30 ("When they exited their car, the officers merely approached Smith requesting his identification, or even just his name. Such a non-

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court also found that although the officers effectively blocked the defendant's movement by standing on either side of the telephone pole, the officers' positioning was the only place the officers could have stood to speak with the defendant.[41] The court explained that "even if the pole and the wall created the illusion of being restrained, it must be remembered that mere physical limitations on an individual's movement, not created by police, are insufficient to turn an encounter with police into a restraint of liberty."[42] The court, therefore, found that "under all the circumstances of this encounter, an objectively reasonable person would have felt free to decline the officers' requests or otherwise terminate this encounter."[43]

In the present case, Officers Edwards and Griffin pulled their cruiser along side of Defendant and asked him if they could speak to him. Defendant stopped walking, turned to the police cruiser, and

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threatening request does not elevate an otherwise consensual encounter between a citizen and the police into a seizure.").

[41] *See id.*

[42] *See id.* at 30–31 ("When the freedom of movement of a person is limited by a physical obstruction not created by the police, the correct test for seizure is not 'free to leave,' but free to terminate the encounter by refusing to answer questions.") (*citing Bostick*, 501 U.S. at 436, 111 S.Ct. 2382).

[43] *Id.* at 31.

voluntarily produced his identification. Defendant voluntarily complied with the officers' request to talk and, therefore, the encounter to this point lacked any elements of objective coercion. Officers Edwards and Griffin did not activate their cruiser's lights or siren, they did not exit the cruiser, they did not draw their weapons, they did not accuse or question Defendant regarding any crime or specific event, their question, "[c]an I speak to you for a minute," was general and non-threatening, and the officers did not physically restrain or block Defendant's movement. The most important factor, of course, is that Defendant voluntarily stopped walking and voluntarily produced his identification.[44] On these facts, as in *Young*, an objectively reasonable person would have felt free to terminate the encounter or refuse to answer the officers' question.[45] This initial interaction between the officers and Defendant, therefore, did not rise to the level of a Fourth Amendment seizure.

The next question is whether Officers Edwards and Griffin seized Defendant when they exited the police cruiser and approached Defendant, before he admitted to possessing the firearm. Officers Edwards and Griffin exited their vehicle to complete the FIO after observing Defendant's extreme

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[44] *See id.* at 29 (explaining that simply because someone responds to a police request it does not follow that a seizure occurs).

[45] *See Young*, 105 F.3d at 6.

nervousness. Both officers approached Defendant from the same side, both facing Defendant, and merely asked him whether Defendant had anything in his possession that the officers should know about. Neither officer drew his weapon, physically touched Defendant, or verbally threatened or accused Defendant of anything. The officers here, unlike in the *Smith* case, did not physically block Defendant's ability to walk away. The officers approached Defendant, asked one simple question, and Defendant immediately admitted to having a firearm in his possession. This encounter exhibits none of the objective factors that traditionally raise police encounters to the level of a seizure which implicates the Fourth Amendment.[46]

Defendant argues that he was seized because Officers Edwards and Griffin retained his identification throughout the entire encounter. The United States Supreme Court has suggested that the retention of a suspect's identification is one factor that weighs in favor of finding a seizure.[47] In *Florida v. Royer*, the Court held that:

> [W]hen the officers identified themselves as narcotics agents, told Royer that he was

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[46] *See Smith*, 423 F.3d at 30–31 (finding that no seizure occurred in a case with facts similar to the case herein considered).

[47] *Florida v. Royer*, 460 U.S. 491, 501–02, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

> suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. These circumstances surely amount to a show of official authority such that "a reasonable person would have believed he was not free to leave."[48]

The facts in this case, however, are quite different from those presented in *Royer*. In *Royer*, two narcotics officers approached Royer, affirmatively requested Royer's driver's license and ticket, asked Royer specific questions regarding his suspicious conduct, accused Royer of transporting narcotics, and asked Royer to accompany the officers to a police interrogation room.[49] The encounter in *Royer* occurred fairly slowly and over several minutes. The officers in *Royer* did retain Royer's driver's license, but that fact was merely one factor, among many, that made the encounter a seizure.[50]

Officers Edwards and Griffin did retain possession of Defendant's identification throughout the encounter, including the time when the officers

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[48] *Id.* (*citing Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870).

[49] *See id.* at 501, 103 S.Ct. 1319.

[50] *See id.* at 501–02, 103 S.Ct. 1319.

exited the cruiser and approached Defendant. The entire encounter, however, occurred very quickly. Officer Edwards testified that approximately two to three minutes passed between the officers' initial contact with Defendant and Defendant's statement regarding the firearm. Officer Edwards, furthermore, retained Defendant's identification for the purpose of searching the BPD's computer database to determine whether Defendant had any outstanding warrants. Both officers, however, exited the cruiser before Officer Edwards completed the computer search. In short, the encounter happened so quickly that Officers Edwards and Griffin never had an opportunity to return Defendant's identification to him. The most important fact, furthermore, is that Defendant voluntarily gave the officers his identification without any request by the officers. The retention of Defendant's identification in this case does not convert this otherwise consensual encounter into a Fourth Amendment seizure.

This court finds that under all the circumstances presented in this case an objectively reasonable person would have felt free to terminate the encounter with Officers Edwards and Griffin. The traditional objective factors that indicate coercion and characterize a seizure are absent from this case. Defendant voluntarily responded to the officers' initial inquiry, voluntarily produced his identification, and without coercion admitted to possessing a firearm.

"While most citizens will respond to a police request, the fact that people do so, and do so without

being told they are free not to respond, hardly eliminates the consensual nature of the response." Although a person may regret staying to answer an officer's questions . . . such regret does not transform an otherwise consensual encounter into an unconstitutional seizure.[51]

The encounter between the two officers and Defendant simply did not rise to the level of a Fourth Amendment seizure. Defendant, therefore, was not seized prior to making the incriminating statement regarding his possession of the firearm.

The officers, once hearing Defendant's statement, had sufficient probable cause to search and arrest Defendant, which they proceeded to do. The officers properly searched Defendant with probable cause and incident to the lawful arrest, during which the officers discovered the firearm in question and seized it.[52] The conduct of Officers

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[51] *Smith*, 423 F.3d at 29 (*quoting Delgado*, 466 U.S. at 216, 104 S.Ct. 1758).

[52] *See, e.g., Chimel v. California*, 395 U.S. 752 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or to effect his escape . . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence

(continued...)

Edwards and Griffin, therefore, did not violate the Constitution at any time during their encounter with Defendant. This court, having decided that a seizure did not occur, need not consider or determine whether Officers Edwards and Griffin had sufficient reasonable suspicion or probable cause to initiate their encounter with Defendant.

Conclusion

For the reasons stated above, the encounter between the two Boston Police officers and Defendant did not rise to the level of a Fourth Amendment seizure. Defendant's incriminating statement occurred during a consensual encounter with police and was not the product of a seizure. As a result of that statement, the officers had sufficient probable cause to arrest and to search Defendant. Defendant's Motion to Suppress is DENIED.

AN ORDER WILL ISSUE.

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on the arrestee's person in order to prevent its concealment or destruction.").

APPENDIX C
Order of the United States District Court for the District of Massachusetts

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UNITED STATES OF AMERICA,

v.

TYSON FORD,
Defendant.

Criminal No. 05-10326-JLT

UNITED STATES DISTRICT COURT DISTRICT
OF
MASSACHUSETTS

ORDER

July 20, 2006

TAURO, J.

This court hereby orders that:

1. Defendant's Motion to Suppress [# 16] is DENIED.

IT IS SO ORDERED.

/s/ Joseph L. Tauro
United States District Judge

APPENDIX D
Excerpts from Transcript of Proceedings Before the United States District Court for the District of Massachusetts on Defendant's Motion to Suppress

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UNITED STATES of America,

v.

Tyson FORD,
Defendant.

Criminal No. 05–10326–JLT.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BEFORE THE HONORABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

April 25, 2006

APPEARANCES

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Court Reporter: Carol Lynn Scott, CSR, RMR
Official Court Reporter
One Courthouse Way, Suite 7204
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DIRECT EXAMINATION OF DARAN EDWARDS
[TR. 19:11-21:9]

BY MR. PIROZZOLO

Q: Please describe what you saw.

A: I observed an individual, he was walking on the sidewalk on Harvard Street approaching Gleason Street.

Q: Did you observe him --

THE COURT: Does that mean he was walking towards you or away from you?

THE WITNESS: He was walking in front of us because he was already on Harvard Street approaching Gleason. So we were coming up sort of behind him in our cruiser.

THE COURT: So you were both going in the same direction?

THE WITNESS: Same direction.

BY MR. PIROZZOLO

Q: Now, in your police report – did you prepare a police report?

A: Yes, I did.

Q: In your police report you described Mr. Ford's direction in two different ways. At one point you said it was outbound; do you recall?

A: Yes.

Q: And another point in the report you said it was, he was walking inbound?

A: That was a clerical error. It was all outbound.

Q: Now, what did you observe Mr. Ford do?

A: As we were approaching him to his, I believe it was to his left side, he looked over at our cruiser. He looked over his shoulder. Upon observing us he immediately looked down as if he was trying to conceal his identify. He had on like a black baseball cap so we couldn't really see his face.

Q: Did he change the direction in which he was walking?

A: Yes, he did.

Q: What did you observe him do?

A: At that point, upon observing us he was sort of right at the corner of Harvard and Gleason Street so he immediately changed – made a change in direction onto Gleason Street and started to pick up his pace walking a little faster.

Q: Gleason Street is a one-way street?

A: Yes, it is.

Q: A one-way street –

A: Coming out to Harvard Street.

Q: What then did you do?

A: At that point we immediately, we sort of stopped at the corner of Harvard and Gleason. And he was like – I may have said to my partner do you know this kid and I believe he said something like no.

So, you know, we just proceeded to pull up alongside him just to speak to him.

CROSS-EXAMINATION OF DANIEL GRIFFIN
[TR. 66:2-67:23, 68:20-70:18, 71:3-71:13]

BY MR. CULLEN

Q: Where did he get his ID?

A: I believe out of his pocket, his right pocket.

Q: His right pocket?

A: I believe.

Q: Right front pocket?

A: I believe so.

Q: And he handed it to you?

A: He did.

Q: Was he annoyed?

A: I'd say so, yes.

Q: He didn't like being stopped?

A: He didn't like speaking to the police I guess.

Q: And then you asked him his name; didn't you?

A: No, I looked at his license and got his name.

Q: Okay. Did you ask him where he lived?

A: I asked him if he was from around there, based that I hadn't seen him in the neighborhood before and I knew most of the kids in that neighborhood.

Q: What was the address on his license?

A: I don't recall. It was a Mattapan address though.

Q: So it was consistent with what he told you? His address on his license was consistent with his response to your question?

A: You mean was he lying to us about where he lived?

Q: Right.

A: Yeah, you're correct.

Q: Did you ask him any other questions?

A: Again, it was small talk.

Q: Such as?

A: You know, I said where you from, that type of thing, nothing memorable (ph.).

Q: Did you ask him where he was coming from or where he was going?

A: I don't recall.

Q: Did you ask him what he was doing in the neighborhood?

A: I don't recall that question, no.

Q: That's the reason why you stopped him though, wasn't it, is because you didn't recognize him as being from the neighborhood?

A: No, I said I don't remember asking him that sort of question is what I'm saying.

Q: But you didn't ask him what he was doing there?

A: No, I asked him where he was from.

Q: Anything else that you can recall you asked him?

A: No.

Q: Did he respond to all your questions?

A: I believe so.

* * *

Q: And you said you got out of the cruiser because you were going to complete the FIO?

A: That's correct.

Q: Did you have the FIO in your hand?

A: I had my notebook and my pen.

Q: And what information did you need to complete that you hadn't already learned?

A: It could be anything. Shoes, whether or not he had jewelry on, it could be several different items. That's all required in the FIO.

Q: But you could see him from the window, couldn't you? He was standing four feet from you?

A: His height, his weight, a lot of different characteristics I could get by getting, you know, a level eye view of him than sitting in the cruiser.

Q: You mean sitting in the cruiser you couldn't tell us how tall he was?

A: No.

Q: No?

A: No.

Q: And you can't tell us what his approximate weight is?

A: No.

Q: You couldn't tell whether he was wearing jewelry?

A: No.

Q: All of that is necessary for you to get out of the cruiser to get?

A: I like to be thorough.

Q: You like to be thorough.

So you have to get out to make those observations because you can't make them from the cruiser sitting down?

A: No. I chose to get out and to be accurate on my information gathering.

Q: Is that the only reason you got out?

A: That's correct, sir.

Q: What did Mr. Ford do when you got out?

A: Like I stated before, he raised his hands and said what's this all about.

Q: And what did you respond to him?

A: I'm not required to answer his questions.

Q: Did you say to him, well, I just want to get some information from you?

A: No. Again, I'm not required to give him answers to his questions.

Q: But I'm asking you – I understand you are not required. Did you say I am just getting some information, I have to fill out this form (indicating)?

A: No. Based on his hands trembling and him shaking and sweating, I asked him are you sure you have nothing on him. That's when he said to me, Yeah, I have a gun on me.

* * *

Q: But you got out and when you say you weren't suspicious but did you suspect or think he may have had something on him, either firearms or drugs?

A: At that point, no, I just observed him being nervous for some reason.

Q: So the mere fact that he was nervous, is that one of the reasons why you got out of the car?

A: No.

Q: It wasn't because he was nervous, it was because you wanted to complete the FIO?

A: That is correct, sir.

DIRECT EXAMINATION OF TYSON FORD
[TR. 88:23-90:9, 94:10-95:3, 97:1-97:15]

BY MR. CULLEN:

Q: Now, could you tell us what happened on September 8th when you were stopped by the police?

A: Well, I was coming from my girlfriend's house. I was walking up Bernard Street which is off of Harvard Street. I crossed the street. It was normal for an average person to look both ways before crossing the street. I crossed over.

And at that particular time the marked cruiser happened to be coming up the street. Gleason Street is not far from Bernard Street but it's on the opposite side of the street.

As I was turning up Gleason Street, I heard a car behind me. And I was walking up a one-way street. So I turned around and looked, I see the marked cruiser.

As I was, I still continued walking, they pulled up alongside me. Officer Griffin stuck his arm, his forearm out the window and his head outside the window and asked me, he said, hey, James, where you been. I said my name is not James, my name is Tyson Ford. So I took it upon myself to get my identification which was my driver's license.

And from that point he asked me did I live around here, which I told him no. And the questioning continued on to the point where he asked me where was I going. I explained to him I

was coming from the address which is on my driver's license. I was heading up to friend's house on Charlotte Street which is in the same route that I was walking.

In order to get to Charlotte Street, I would have to walk up, you know, geographically I would have to walk up Gleason Street. From that point he asked me, I believe he asked me why was I – what was I doing in the area. I answered that question, which I did.

From that point he got out of the car and he asked me was I – actually while in the car he asked me did I have anything I needed to tell him about. I told him no.

From that point, that's when he was running my name and all that and I told him I don't have no warrants, no probation or nothing.

* * *

Q: Would you describe what your attitude was at that time?

A: Well, from the point that I gave them my ID, actually I was a little uneasy at the time they called me by James which I know is not my name.

You know, from experience I understand that, you know, if somebody called you by another name, there's a chance they might think you're somebody else and I didn't want to be in that position so I offered my ID. I was uneasy at the time. I wasn't visibly shaking or stuttering.

So I gave them my ID to clarify that. And then from that moment when they jumped out of the car, I felt like, okay, this is going in a whole different direction from a normal FIO.

So I felt like they were overstepping their boundaries at the time. At the time I felt like I couldn't walk away. They had my identification. So if I was free to leave, I could never leave. I paid for that driver's license. I was trying to obtain it but I couldn't. It was in their possession.

* * *

Q: Did the car block your ability to go forward on Gleason Street:

A: No, but once they had my ID in their possession, I couldn't leave. I did ask for it at one point.

Q: You asked them for your ID?

A: Yes, I did.

Q: And when was that?

A: That was after the fact. That was – once they got out of the car, that's when I said what about my ID. And I said what's this all about.

I did ask for my ID because I felt that I didn't commit no crimes. They didn't approach me with caution meaning that if I was committing a crime, I'm sure they would take precaution approaching me. So I felt like I didn't do nothing wrong. They

know I did nothing wrong, give me my ID and let me go mind my business.